Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Services, Inc. Petition for	)	WC Docket No. 16-363
Forbearance from Enforcement of	)	
Certain Rules for Switched Access Services	)	
and Toll-Free Database Dip Charges	)	

OPPOSITION OF OMNITEL COMMUNICATIONS, INC.

Omnitel Communications, Inc. ("Omnitel"), through its undersigned counsel and pursuant to the Federal Communications Commission's ("Commission's) Public Notice,[1] hereby submits its opposition to the above-referenced petition for forbearance filed by AT&T Services, Inc. ("AT&T").[2] AT&T purports to ask the Commission to impose a mandatory detariffing regime against any local exchange carriers ("LECs") whose access services satisfy the Commission's definition of "access stimulation."[3] Specifically, AT&T asks the Commission to preclude such LECs from filing interstate access tariffs governing tariffed interstate tandem switched transport and tandem switching charges for the services that they provide to interexchange carriers ("IXCs").[4] As explained herein, the *Petition* should be denied.

I. INTRODUCTION AND BACKGROUND

Omnitel is a facilities-based rural competitive local exchange carrier ("CLEC"). Omnitel has been operating in smaller communities and less dense areas of Iowa since 2000. Omnitel

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1 *Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239, (released Nov. 2, 2016).

2 *Petition of AT&T Services, Inc. for Forbearance under 47 U.S.C. § 160(c)*, WC Docket No. 16-363 (filed Oct. 30, 2016) ("*Petition*").

3 *See* 47 C.F.R. §61.3(bbb).

4 The *Petition* also seeks forbearance from LEC tariffed charges for toll-free database queries. Omnitel offers no comments on that portion of the *Petition*.

serves more than fifteen hundred residential and business customers in North Central Iowa, offering voice services, data and data management services, video, and wireless GSM PCS services utilizing copper, coax, and fiber to the home. Omnitel participated in the proceedings that led to the *USF/ICC Transformation Order*[5] and the rules governing local exchange carriers that satisfied the Commission's definition of "access stimulation." Omnitel generally supported the Commission's proposals to address access stimulation and eliminate continuing uncertainty regarding intercarrier compensation.[6] AT&T also actively participated in the proceeding and advanced its positions for the Commission's consideration on multiple occasions.

After more than four years of deliberation, the Commission, in the *USF/ICC Transformation Order,* modified the access charge rules rural CLECs like Omnitel had operated under. To tackle the contentions by parties such as AT&T that the Commission should address interstate switched access rates charged by LECs engaged in so-called "access stimulation," the Commission struck an important balance to act in a "narrowly tailored" fashion to "minimize the costs of the rule revisions on the industry."[7] The Commission addressed the concerns of AT&T and other IXCs by requiring that CLECs whose activities qualified under the definition of "access stimulation" adopted in the *Order* benchmark their interstate switched access tariffed rates to the rates of the price cap LEC with the lowest rates in the state. The Commission found that such benchmarked rates "are presumptively consistent with section 201(b) of the Act."[8]

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5 *In re Connect America Fund*, Report and Order, 26 FCC Rcd 17663, (2011) ("*USF/ICC Transformation Order*").

6 *See, e.g.*, Comments of Omnitel Communications, Inc. and Tekstar Communications, Inc., WC Docket No. 10-90 et al. (filed Apr. 1, 2011) and Reply Comments (filed Apr. 18, 2011).

7 *USF/ICC Transformation Order*, ¶¶ 660, 662.

8 *Id*., ¶ 660.

Several parties, including AT&T, had argued that the Commission should declare revenue sharing to be a violation of Section 201(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §201(b), or prohibit the tariffing and collection of switched access charges for traffic sent to LECs that meet the conditions for access stimulation.[9] Rather than take that action, the Commission in the *USF/ICC Transformation Order* determined that a complete ban on revenue sharing arrangements – and the billing of access charges for traffic subject to those arrangements – would be overly broad. The Commission found expressly on the record in the docket that the IXC advocates had "[not] demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases."[10] Instead, the Commission adopted rules that dramatically reduced interstate switched access rates of affected LECs designed to ensure those rates satisfied the just and reasonable standard of Section 201(b).

Since the *USF/ICC Transformation Order*, because Omnitel engages in access stimulation as defined in that *Order*, it has benchmarked its interstate tariffed switched access services rates in its Tariff F.C.C. No. 1 to those of the price cap carrier with the lowest rates in the State of Iowa. Following implementation of the *USF/ICC Transformation Order,* Omnitel's tariffed interstate per minute access charge rates have fallen precipitously. In particular, Omnitel's composite rates for a terminating MOU has fallen by over 95% since immediately prior to the rule changes compared with today.[11]

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9 *See USF/ICC Transformation Order*, ¶ 672, n. 1112, 1113.

10 *Id*., ¶ 672.

11 This comparison reflects the 16 miles of transport assessed by Omnitel in its network configuration today. Omnitel's current composite rate at 16 miles of transport is $0.001420/mou.

II. DISCUSSION

AT&T's *Petition* is incorrectly styled as a petition for forbearance under Section 10 of the Act, 47 U.S.C. §160, and the relief AT&T seeks should be summarily denied. The Commission, in its *USF/ICC Transformation Order* imposed a ceiling on tandem switched transport access rates but declined to take the further step of adopting a transition period by which such charges would be mandatorily reduced or detariffed in the manner of terminating end office switching. Further, as the *Petition* acknowledges, the Commission, at the time of that *Order*, initiated a further rulemaking to consider whether to modify further its rules concerning charges for interstate originating access and tandem switching and transport. The *Petition* fails as a Section 10 forbearance petition because, rather than seeking to have the Commission forbear from enforcing any *requirements*, it is asking the Commission to change the rules concerning permissive tariffing. Thus the Petition is either is an untimely petition for reconsideration of the *Order* or an *ex parte* submission asking the Commission to act in the further rulemaking. The *Petition* also is devoid of factual evidence, data, analysis, or affidavits and thus fails to meet AT&T's burden of proof. For these reasons, the *Petition* should be denied on procedural grounds.

A. The *Petition* Is Not a Proper Request for Forbearance

LECs today operate under a permissive tariffing regime, the result of forbearance from the requirements of Section 203 that non-dominant local exchange carriers "shall file" tariffs.[12] The Commission noted at the time that it could not adopt a mandatory detariffing regime because there was no notice of proposed rulemaking that had been issued that would allow it to satisfy

[12] *See In the Matter of Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance*, Order, CC Docket 97-146, 12 FCC Rcd (1997) ("*Hyperion Order*"). *See also* 47 U.S.C. §203.

procedural requirements.[13] Consequently, because tariff filing *requirements* of Section 203 no longer apply, CLECs today choose whether or not to file tariffed charges for access services. If a CLEC chooses to file a tariff, it must follow certain benchmarking rules as set forth in Section 61.26 of the FCC's Rules that cap their rates and are designed to ensure those rates satisfy Section 201(b).[14] Any CLEC that satisfies the definition of "access stimulation" and chooses to file a tariff must benchmark to the switched access rates of the lowest price cap LEC operating in the same state as the CLEC.

Every Petition for Forbearance must identify "[e]ach statutory provision, rule, or requirement from which forbearance is sought."[15] AT&T attempts to identify in Appendix A of the *Petition* the rules it seeks forbearance from to effect a mandatory detariffing regime. Reviewing that Appendix makes clear the Commission cannot grant the relief AT&T seeks – mandatory detariffing of transport rates by certain CLECs and other LECs – by granting forbearance from the rules in question.

First, AT&T claims that it seeks forbearance from the Section 203 requirement that carriers satisfying the "access stimulation" definition must file tariffs for charges for tandem switching and transport.[16] However, as just noted, the Commission has already granted forbearance from those tariff filing requirements generally. In short, the requirement in question

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13 *See Hyperion Order*, ¶ 1. The Commission proceeded to raise the potential further step of mandatory detariffing in a notice of proposed rulemaking. *See Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Notice of Proposed Rulemaking, 12 FCC Rcd 8613 (1997).

14 47 C.F.R. §61.26.

15 47 C.F.R. §1.54(a)(1).

16 *See Petition*, Appendix A. In identifying the rules it seeks forbearance from, AT&T declines to mention originating end office switching. AT&T's failure to identify rules for which it seeks forbearance applicable to originating end office switching, as required by Section 1.54(a)(1) of the rules, should lead to summary denial of the *Petition* if and to the extent that it otherwise suggests AT&T otherwise seeks forbearance relative to originating end office switching charges.

no longer exists. LECs, when they are not dominant, are under a permissive tariffing regime already. Forbearance from Section 203 cannot be granted a second time to achieve a different result.

Second, AT&T seeks forbearance from Part 61 of the rules "to the extent that it allows for the tariffing of charges for tandem-switching and transport on calls to or from local exchange carriers engaged in access stimulation."[17] The only specific rule sections AT&T cites are Sections 61.26 and 61.47. The former establishes the benchmarking requirements *when a CLEC chooses to file a tariff* and does not "allow" tariffing as AT&T claims. Moreover, to forbear from the requirements of that rule would allow, at least theoretically, tariffed rates exceeding today's benchmarked rates, which is hardly the result AT&T seeks. The benchmarking rules are required to ensure that CLEC rates are just and reasonable, per earlier Commission rulings. Regarding Section 61.47, it expressly applies only to price cap LECs, not to CLECs or other types of non-price cap LECs, such that forbearance from it in the context of the outcome the *Petition* would be inapposite.

Third, AT&T also seeks forbearance from Part 61 of the Rules "to the extent that it allows for the tariffing of charges for tandem-switching and transport on calls to or from local exchange carriers engaged in access stimulation."[18] The only Part 61 rule sections AT&T cites are Sections 69.108 and 69.111. The first applies to the DS3-to-DS1 benchmark ratio to which incumbent LECs are subject and does not apply directly to CLECs. Similarly, Section 69.111 establishes transport rate structure and level requirements for incumbent LECs and not CLECs. Again, forbearance from these rules would seem inapposite to the relief the *Petition* seeks, at least as applied to CLECs.

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17 *See Petition,* Appendix A.

18 *Id*.

Finally, the *Petition* seeks forbearance from Part 51 of the Rules "to the extent that it allows for the tariffing of charges for tandem-switching and transport on calls to or from local exchange carriers engaged in access stimulation," mentioning only rule section 51.913 specifically.[19] That section provides for the assessment and collection of Access Reciprocal Compensation charges set forth in a LEC's tariffs for the access services defined in Section 51.903 when either the LEC itself delivers traffic to the called party's premises or delivers the call to the called party's premises through arrangements with a provider of interconnected VoIP service.[20] While this provision conceivably could be the subject of a forbearance petition to target access charges from LECs, whether engaged in access stimulation or otherwise, the *Petition* makes no effort to justify forbearance from this particular provision. Rather, AT&T attempts to sweep the forbearance of this rule section with the others it identifies. But as noted above, forbearance from those provisions would not result in the post-forbearance regime AT&T seeks in the *Petition*.

B. The *Petition* Otherwise Fails to Satisfy Threshold Requirements for Forbearance

AT&T's *Petition* is fatally flawed in other respects. In addition to identifying the specific statutory provisions or rule sections from which forbearance is sought, Section 1.54(b) requires a petitioner to "specify how each of the statutory criteria is met with regard to each statutory provision or rule, or requirement from which forbearance is sought." 47 C.F.R. §1.54(b)(1). AT&T not only fails to do this, it does not even make the attempt. Apart from providing a

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19 *Id.*

20 47 C.F.R. § 51.913(b).

laundry list of the provisions from which it seeks forbearance, the *Petition* makes no mention of the statutory provisions and rule sections again when attempting to apply the statutory criteria.[21]

Moreover, a petitioner for forbearance has the burden of proof.[22] The Commission has made clear that to satisfy this burden, the petitioner must bring together the data and analysis in support of its position to demonstrate that the three prongs of Section 10's forbearance criteria are satisfied. The petition must be "complete as filed." As the Commission stated in its 2009 *Forbearance Procedures Order*, "[i]f the petitioner does not support the case for forbearance with sufficient evidence and persuasive arguments, the Commission cannot make an informed and reasoned determination that the statutory criteria are met."[23] Sections 1.54(b)(2) and 1.54(d)(2) sets forth requirements regarding the data and analysis that are to be provided, making plain that it must be contained within the petition for forbearance filing itself. AT&T's *Petition*, as applied to transport access charges, is essentially devoid of any data or evidence.

In many places, AT&T relies on conclusions from the *USF/ICC Transformation Order*, adopted more than five years ago. However, the Commission's findings in the *USF/ICC Transformation Order* were based on record evidence from 2011 and prior periods.[24] In response to that record, the Commission adopted significant regulatory reforms as described in Section I. AT&T claims that the reforms were insufficient, yet it fails to back up its assertions of the circumstances today and the effects of that *Order* with *current* data, other factual evidence,

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21 *See Petition* at 13-19. None of the provisions cited on the first page of AT&T's *Petition*, Appendix A is even mentioned in this core part of the *Petition* itself.

22 *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended*, FCC 09-56, WC Docket No. 07-267, Report and Order, ¶ 20 (2009) ("Forbearance Procedures Order").

23 *Id.*, ¶ 21.

24 Thus, for example, AT&T's claim that the deployment of IP networks has been delayed by continued access stimulation since the Commission stated this was the case in 2011, is not supported by any data about the delays, their magnitude, or their cause over the past five years.

analysis, or even affidavit support. The old record and the Commission's conclusions based on it cannot support very different relief *today*.

AT&T does describe a single carrier, without identification, that allegedly charges 192 miles of tandem switched transport on "virtually every" minute of traffic.[25] AT&T does not identify the volumes of traffic involved or the access charges AT&T has paid or has been billed by this carrier. AT&T states that it is in litigation with this carrier and confident of winning,[26] which would appear to obviate the need for any action by the Commission in response to the *Petition* to address that situation. But in any event, that single situation or other isolated situations, assuming they exist – the *Petition* fails to describe others – cannot justify the broad relief AT&T seeks; yet AT&T offers no other evidence to support its *Petition*.

Rather, AT&T makes a series of claims which cannot satisfy its burden of proof. AT&T does not claim that the carriers that engage in access stimulation defined by the Commission's rules are engaging in unlawful behavior – how could it, since the Commission's rules specifically provide direction how carriers may engage in access stimulation and are entitled to a presumption of reasonableness – yet it sweepingly and erroneously calls such carriers "unscrupulous."[27] Among other matters, AT&T fails to consider the public interest served by free conference calling which is relied upon by numerous corporations and small businesses, government bodies, educational institutions, public interest groups, and citizens.

The *Petition* claims that the charges of such carriers are "inflated" or "increased,"[28] yet under the regime the Commission adopted in the *USF/ICC Transformation Order* they must be

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25 *Petition* at 10.

26 *Id.* at 10, n. 18. The fact of the litigation suggests that AT&T could have provided the Commission with additional facts about this carrier.

27 *See id.* at 9 and 15.

28 *See, e.g., id.* at 9, 13, n. 19, and 15.

benchmarked to price cap LEC rates which are at or below levels frozen in 2012. AT&T's claims hardly demonstrate that these rates have "increased," are "inflated," or are unreasonable, unless the same can be said of the underlying price cap LEC rates. It is not surprising that AT&T makes no such claim since its own local operating company affiliates are often the price cap LEC carriers in question. Generally, AT&T fails offer data how charges from and minutes billed by carriers engaged in access stimulation – identifiable because of the tariffs they file – have changed since the *USF/ICC Transformation Order* was released.

If there are certain carriers that AT&T or any other IXC believes are engaging in unlawful behavior because of, for example, billing for a number of miles of transport that is unreasonable and unjustifiable, AT&T has the ability to bring a complaint, as its own *Petition* underscores. Yet, because the *Petition* is devoid of any evidence and relies almost exclusively on findings made by the Commission more than half a decade ago (on a record even older than that) when the Commission adopted reforms in the *USF/ICC Transformation Order based on that record and those conclusions*, AT&T has failed to meet its burden, and the *Petition* should be summarily denied.[29] At most, AT&T's *Petition* should be treated as an *ex parte* submission in the pending rulemaking considering further changes to the intercarrier compensation framework.

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[29] In addition to its other failings, the Petition fails to address the question of appropriate and reasonable compensation for transport should the Commission grant the relief AT&T seeks. AT&T seemingly desires, in the absence of tariffing, to pay nothing at all to carriers lawfully engaged in access stimulation and providing transport services, making AT&T's proposal contrary to the public interest. But the result of any "forbearance" prohibiting certain carriers from assessing transport access charges would not be bill and keep for such services, and any assurances that IXCs would pay just and reasonable access rates – ensured today due to benchmarking – would be absent. Tariffed transport rates of competitive LECs benchmarked to incumbent LEC rates ensure that LECs charge just and reasonable and non-discriminatory rates against all IXCs. Thus, granting the relief AT&T seeks, as applied to Section 61.26, would fail to satisfy the first criterion for forbearance under Section 10. At bottom, AT&T's real complaint is not the continued application of any of the access charge rules from which it seeks forbearance but that some of its end users customers are taking advantage of the calling plans offered by it in ways differently than others. Any claim of subsidies by one set of end users is simply another way of stating that some customers are not taking advantage of their IXC-

III. CONCLUSION

The Commission should dismiss the AT&T *Petition* with respect to charges for tandem switching and transport access charges. The *Petition* is not a proper Section 10 forbearance request. The issues raised by AT&T are appropriately already under consideration by the Commission in the further notice that came out of the *USF/ICC Transformation Order*. In any event, AT&T has failed to properly support its *Petition* in violation of Section 1.54 of the Commission's Rules and should be denied, if not summarily denied.

Respectfully submitted,

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provided unlimited flat rate calling plans to the extent others are. But it will always be the case that some customers of such plans will use more and others use less than the assumed average by which IXCs establish their rate plans. Such "subsidies" will continue even were the Commission to grant the relief AT&T seeks, highlighting why AT&T's method of addressing this "problem," by stripping certain local exchange carriers from the ability to file tariffed rates, is unsound.